# Nos. 14,515 and 14,501

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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| THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.* | No. 14,515 |
| IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.* | |
| THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.* | No. 14,501 |

## NOTICE OF MOTION, MOTION TO CONSOLIDATE APPEALS and MEMORANDUM OF APPELLANTS SUGGESTING HEARING EN BANC.

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FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
*Counsel.*

Nos. 14,515 and 14,501

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## NOTICE OF MOTION TO CONSOLIDATE APPEALS AND FOR HEARING EN BANC.

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*To Appellee, The Western Pacific Railroad Company, and to Its Attorneys, Allan P. Matthew, James D. Adams, Burnham Enersen and Robert L. Lipman, Esqs.:*

You will please take notice that on Monday, October 18, 1954, at 10:00 o'clock a.m., or as soon thereafter as

counsel can be heard in the Courtroom of the above entitled Court in the Post Office Building, Seventh and Mission Streets, San Francisco, California, appellants, Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, will bring on the aforesaid motion for hearing before the above entitled Court.

Dated, September 27, 1954.

Western Pacific Railroad Corporation
and
Alexis I. du Pont Bayard, Receiver,
*Appellants,*

By LEROY R. GOODRICH,
*Their Attorney,*

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
*Counsel.*

Nos. 14,515 and 14,501

IN THE

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| IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.* — THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.* | No. 14,501 |

## MOTION OF APPELLANTS FOR AN ORDER CONSOLIDATING APPEALS AND FOR HEARING THEREON BY THE CIRCUIT JUDGES SITTING EN BANC.

Appellants, The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully move the Court for an order consolidating their appeals in the above entitled matters and for the hearing thereon by the Circuit Judges sitting en banc.

This motion is based upon the complaint and amended complaint filed by the appellants in Civil Action No. 33,514 in the District Court, and upon the orders, judgments and decrees and the pleadings, papers and all other files and records certified by the District Court to this Court in each of the above entitled proceedings, together with the "Memorandum of Appellants Suggesting Reasons for Hearing of These Appeals by the Circuit Judges Sitting En Banc", which memorandum is filed herewith and made a part hereof.

Said motion is further based upon the following facts:

(1) That the matters involved and the issues raised in each of said appeals are so interrelated that, either in oral argument or in the presentation of these issues by either the appellants or the appellees in written briefs, it would be impossible for the parties to present these issues separately without great repetition, expensive to the parties and onerous and burdensome to the Circuit Judges, and

(2) That in the hearing in the District Court upon the issues presented in these two matters and to save time and expense to the District Court and to the parties, the presentation and argument of the questions involved was, by stipulation and by permission of the Court, made in one hearing and contemporaneously.

Appellants respectfully pray that this Court make an order for the consolidation of said appeals for briefing, hearing and argument and, for the reasons

set forth in the memorandum of suggestion filed herewith, for the hearing thereof by the Circuit Judges sitting en banc.

Dated, September 27, 1954.

Western Pacific Railroad Corporation
and
Alexis I. du Pont Bayard, Receiver,
*Appellants,*

By LEROY R. GOODRICH,
*Their Attorney,*

FRANK C. NICODEMUS, JR.,
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Nos. 14,515 and 14,501

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# United States Court of Appeals

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| THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.* | No. 14,501 |

## MEMORANDUM OF APPELLANTS SUGGESTING REASONS FOR HEARING OF THESE APPEALS BY THE CIRCUIT JUDGES SITTING EN BANC.

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Availing of the right recognized in the opinion of Chief Justice Vinson in *Western Pacific Railroad Corporation et al. v. Western Pacific Railroad Company et al.* (345 U.S. 247) the Appellants respectfully suggest that these appeals present special circumstances

and important implications which justify the exercise of the *en banc* power as established by the Supreme Court in *Textile Mills Securities Corporation v. Commissioner* (316 U.S. 326) and confirmed by 28 U.S.C. Sec. 46(c).

Among reasons underlying the Appellants' suggestion are the following:

The principal appeal is from an order of the District Court made by Judge Louis E. Goodman, which grants a motion of the Appellee Western Pacific Railroad Company for a summary judgment afterwards entered dismissing a successoral Bill of Complaint brought by the Appellants against the Western Pacific Railroad Company to implement and give effect to the decision of this Court in *Western Pacific Railroad Corporation et al. v. Western Pacific Railroad Company et al.* (197 F.2d 994) rendered October 29, 1951, and being No. 12506 on the then docket of this Court. For convenience a copy of the amended successoral Bill of Complaint is annexed.

The secondary appeal is from an order adjudging the Appellants in contempt of Court for having filed the Bill of Complaint.

These appeals involve the final disposition of a fund of $17,201,739, with interest accretions from a date or dates not later than March 15, 1944.

The amount is stupendous, which is one of the reasons specified by Justice Frankfurter that might justify resort to the collective wisdom of all Circuit Judges.

This fund is held by the Appellee Western Pacific Railroad Company under a claim of complete beneficial ownership notwithstanding (1) that not a single judge has ever admitted the validity of its claim and not less than two well considered judicial opinions, one by Justice Jackson and one by District Judge Fee, now a member of this Court, and an impressive article in the Harvard Law Review, have strongly asserted its invalidity; and, as we further respectfully represent, (2) that its invalidity is implicit in the opinion of the majority of the three judge panel which rendered the decision of this Court in No. 12506. This opinion written by District Judge Byrne was concurred in by Circuit Judge Healy.

The Appellants suggest that the views of Circuit Judges Healy and Fee, though assumed to be divergent, are soundly reconcilable and that such a reconciliation is a function which may be appropriately performed by all active Judges of this recently enlarged Court of Appeals sitting *en banc.*

A brief historical sketch will put the point of divergence in true focus, and in considering its implications it will be helpful always to bear in mind the fundamental requirement in our jurisprudence that any legislative enactment and any judicial determination should conform to the obvious dictates of reason and common sense: that even the letter of the law may be changed to avert an absurd and indefensible result.*

*The background of this principle and the earlier cases are supplied by the opinion of Circuit Judge Learned Hand in *Cabell v. Markham* (48 F2d 737 (2 Cir.)).

Although this sketch must be radically condensed, it will give the Court the salient features of the case.

In 1935 the Western Pacific Railroad Company, as debtor, filed a petition for reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. 205), and Thomas M. Schumacher and Sidney M. Ehrman were appointed and confirmed as Trustees. A plan of reorganization effective as of January 1, 1939 was certified by the Interstate Commerce Commission to the District Court at San Francisco and was approved by the District Court August 15, 1940. On Appeal to this Court, the action of the District Court was reversed, and on March 15, 1943, under writ of *certiorari* the decision of this Court was reversed by the Supreme Court and the order of the District Court was reinstated (318 U.S. 448).

Under the Commission's plan of reorganization the debtor's capital stock was declared to be without value and no provision was made therefor. Full compensatory treatment was accorded some but not all of the secured creditors and there was no provision made for unsecured creditors.

The case in the Supreme Court was argued October 13 and 14, 1942, and was decided March 15, 1943.

At that time the revenues of the debtor Western Pacific Railroad Company, by reason of the national defense program, were surging upwards to unprecedented levels, and the Western Pacific Railroad Corporation, as owner of all of the debtor's capital stock, which had been adjudged by the Interstate Commerce

Commission to be without value in its 1939 appraisals, contended in the Supreme Court that the property should be revalued to give effect to its current earning power. The supporters of the plan asked that "that issue . . . should be faced squarely by this (the Supreme) Court" but urged that the argument took "no account . . . of the increasingly heavy Federal income and excess profits taxes necessarily resulting from the very facts which give rise to the increased revenues". The Court then "in the interest of advancing the solution of as many problems in reorganization as possible . . . deliberated upon the effect to be given these unexpectedly large earnings" and in upholding the plan noted that "the effect of taxation is not wholly answered by the deduction of tax estimates on the basis of present rates" (318 U.S. 507, 508). In the Milwaukee reorganization case decided the same day and which had been argued at the same time, the identical problem was discussed more fully and the Supreme Court concluded that "the bulge of war earnings" furnished no standard because, among other reasons, of the "great increase in taxes".

While these test cases were under submission in the Supreme Court Congress, by the Revenue Act approved October 21, 1942, inserted in Section 23 of the Revenue Code the paragraph numbered (g)(4) set out in the annexed Bill of Complaint, which gave a stock loss sustained by the parent of a consolidated group the status of an operating loss deductible from all consolidated income instead of only, as theretofore, from capital gains.

As the effect of this new provision of Section 23, Congress remitted the taxes on the war revenues of the Trustees of the debtor Western Pacific Railroad Company since all of its capital stock owned by Western Pacific Railroad Corporation had been declared to be without value and *taxwise* all of the operations of the consolidated group constituted a single business, owned by a corporate parent; but there was no such remission of the equally heavy taxes on the war revenues of the Milwaukee road, whose stock, similarly declared to be without value, was scattered among individual and corporate investors.

Unless the remitted taxes on the swollen war revenues of the Trustees of the Western Pacific Railroad Company were intended to be covered into the Treasury of the Western Pacific Railroad *Corporation,* which had suffered the loss, the Act of Congress providing for such remission while exacting full taxes from the Milwaukee road was not only plainly discriminatory but failed also to conform to the obvious dictates of reason and common sense.

Hence on October 10, 1946, the Appellant Western Pacific Railroad Corporation filed suit against the defendant Western Pacific Railroad Company to require it to account under its Assumption Agreement for the liability of the Trustees of the Western Pacific Railroad Company arising from their use of its tax credit under 23(g)(4) and to transfer the remitted taxes to the Western Pacific Railroad Corporation. This case was tried before District Judge Goodman, whose opinion is quoted at length in the annexed Bill

of Complaint. The Judge was clear in his own mind that Congress did not intend to remit taxes to be retained by the Trustees. He said:

> "To assume, however, that the Congress intended by 23(g)(4) to statutorily authorize what was done in this case is to attribute plain stupidity to the Congress of the United States—an unthinkable procedure despite the general habit of criticism both fair and unfair."

Nevertheless, Judge Goodman, without attempting to give a reasonable effect to the Act of Congress by ordering the remitted taxes to be turned over to the Western Pacific Railroad Corporation, whose loss was the basis of the remission and the source of the fund, and thereby conform to the basic rule that absurd and indefensible results are to be avoided, grudgingly left it in the possession of the reorganized Western Pacific Railroad Company under an obvious misapplication of the principle of *res adjudicata.*

Judge Goodman is No. 1 on the list of judges who believe that in equity and good conscience the remitted taxes could not beneficially belong to the reorganized Western Pacific Railroad Company. To quote briefly his own spirited language:

> "The Court cannot cause these taxes to be paid where they should be paid, to the United States. But as between the parties no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff, as the reorganization decree left it, without interest in the debtor."

There was an appeal to this Court resulting in the affirmance by a divided three-judge panel of the judgment of the District Court dismissing Accounting Action No. 12506. The majority opinion written by Judge Byrne was concurred in by Circuit Judge Healy. There was a dissenting opinion written by the then District Judge Fee. As we shall hereinafter show, not one of these three judges expressed an opinion that the reorganized Western Pacific Railroad Company was in equity and good conscience entitled to retain the remitted taxes as the beneficial owner. Judge Fee was of the opinion that the remitted taxes should be transferred to Western Pacific Railroad Corporation as the parent of the consolidated group whose loss of investment in the Western Pacific Railroad Company was the basis of the tax remission. Judge Fee said:

> "If the plaintiff were still the owner of the stock of the defendant Railroad Company then the allocation of $17,000,000 to defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in the value of stock in the defendant no longer is of avail to the plaintiffs there should be another method of applying the remission to the loss."

Judge Fee is No. 2 on the list of judges who believe that the remitted taxes are not beneficially owned by the defendant Western Pacific Railroad Company.

Judges Healy and Byrne were of the opinion, as shown in the successoral Bill of Complaint, that the

Appellant Western Pacific Railroad Corporation was under a fiduciary duty as sole owner of the lost stock investment in the debtor subsidiary to use its special tax credit under Section 23 (g)(2)(4) for the benefit of the creditors of the subsidiary whose untaxed swollen war earnings created the fund. Their view must be that the remitted taxes belong in equity and good conscience to the creditors and holders of other securities of the bankrupt to whom the Western Pacific Railroad Corporation owed the fiduciary duty, and in very clear language their opinion so states.

Judges Healy and Byrne accordingly are here counted as Nos. 3 and 4 on the list of judges who believe that the remitted taxes are not beneficially owned by the reorganized Western Pacific Railroad Company.

On application of the present Appellants, the Supreme Court granted a writ of *certiorari* to review the divided determination of the three judge panel which includes an order denying a rehearing and an order striking from the files a petition of the Appellants for a rehearing *en banc*.

This Court is familiar with the decision of the Supreme Court which is cited in the opening paragraph of the Memorandum. The orders on the petition for rehearing were vacated and the Court was directed to formulate a Rule to regulate the *en banc* power as confirmed by Section 46(c).

Justice Jackson dissented from this action and wrote an opinion on the merits, in which he said:

> "Indeed it is probable that the intention of the statute permitting the consolidation of the two positions was to provide salvage for the loser, not profit for one who sustained no loss."

Justice Jackson is No. 5 on the list of judges who believe that the remitted tax moneys are not beneficially owned by the reorganized Western Pacific Railroad Company. In addition to these five opinions, reference also should be made to 65 Harvard Law Review 1449.

Following the action of the Supreme Court a Rule was formulated by this Court under which the case was referred back to the original panel consisting of Circuit Judge Healy and District Judges Fee and Byrne. The panel again denied a rehearing, Judge Fee being recorded as not participating. A second petition for a writ of *certiorari* was denied by the Supreme Court, the result being that the original decision of Judges Healy and Byrne in this Court became "the law of the case".

Let it be noted at this point that the decision of Judges Healy and Byrne in effect was an affirmance of the judgment of the District Court, not upon either ground specified by District Judge Goodman, but upon the ground that the reorganized Western Pacific Railroad Company was not accountable to Western Pacific Railroad Corporation as its *sole* pre-reorganization stockholder because the superior equity of pre-reorganized creditors supervened. Necessarily the superior equity belonged only to the creditors for whom no provision or inadequate provision was made

under the plan of reorganization which had been approved by the District Court. Assuming that the fiduciary duty of the parent of a wholly owned subsidiary to the subsidiary's creditors can be carried as far as is indicated by the opinion of Judge Byrne—we had thought the Supreme Court's treatment of Accommodation Collateral question in the reorganization case was not entirely consistent with that idea—it certainly can only be extended to those creditors not fully and adequately provided for in reorganization.

The provision for creditors made by the plan of reorganization presented the critical issue under the decision of Judges Healy and Byrne.

There were three classes—

(1) First Mortgage Bondholders holding a senior lien on the entire estate of the Bankrupt;

(2) Secured Noteholders, collateralized by Second Mortgage Bonds, having a lien on the entire estate of the bankrupt *wholly subordinate* to the First Mortgage;

(3) Unsecured Creditors.

The Interstate Commerce Commission found, and the District Court approved the finding, that the estate of the Bankrupt was sufficient to provide in full for the holders of First Mortgage Bonds and to permit a redundancy of $5,964,296 to be applied toward satisfaction of creditors collateralized by Bonds issued under the wholly subordinate Second Mortgage. This unneeded excess was distributed among the three

Secured Noteholders, all being thereby made whole, except one, which suffered a deficiency of $3,683,175. The unsecured creditors, neither of which received anything on their claims as allowed in the Bankruptcy proceedings, are—

Western Pacific Railroad Corporation, $7,609,-370

Western Realty Company, $60,910

It is now our considered judgment that Judges Byrne and Healy were right in their conclusion that the claim of Western Pacific Railroad Corporation to the remitted taxes was subordinate to the claims that might be asserted by the creditors not receiving full compensatory treatment under the plan of reorganization; and these are those listed above. Further, it is our considered judgment that the superior equity of these unsatisfied creditors would have been enforceable against the fund even if it had been transferred to the Appellants in accordance with the dissenting opinion of Judge Fee; and we do not doubt that Judge Fee himself will concur in this view as being mandatory under the decision of the Supreme Court in *Northern Pacific Railway Company v. Boyd,* 228 U.S. 482. It would be unreasonable and inadmissible under established principles of equity to hold that Congress intended salvage for the loss of the parent's stock investment in a subsidiary unless and until the creditors of the subsidiary had been or were being provided for in full.

Nor do we doubt that Judges Healy and Byrne would not countenance, consciously, the use of the

fund of $17,201,739 further to fatten the obese senior lien creditors who constitute the reorganized Western Pacific Railroad Company and who were so fully and amply provided for out of the Bankrupt's trust estate that, after taking all of it that was needed to do so, there was a redundancy of $5,964,296 passed *down* to creditors secured by a wholly subordinate lien,—an amount sufficient to provide full payment for some creditors but not a single penny for other creditors having valid unsatisfied claims allowed in the Bankruptcy proceeding amounting to $11,358,835.

Apparently the District Court was grievously misled as to the status of these valid, subsisting claims. *And how this happened need not be left to conjecture.* The Appellee's counsel quoted out of context the following provision of the Bankruptcy Court's order of November 27, 1944:—the reorganized Company "shall assume only the valid obligations of the debtor or the debtor's Trustees other than unsecured claims against the debtor not entitled to priority over existing mortgages, *which unsecured claims are hereby cancelled and discharged*". The significance of this provision, *and its limitations,* are obvious when its context is revealed. The Order wherein the provision occurs was part of the machinery necessary under Section 77 in carrying into effect an approved plan of reorganization under the debtor's existing charter. It was a *sine qua non* that the slate be clean and that unsatisfied pre-reorganization claims should be cancelled and discharged *as to it.* But the Bankruptcy Court had no power whatever to cancel and discharge *generally* any

valid indebtedness allowed against the pre-reorganized debtor so as to prevent its enforcement against a solvent guarantor or against any property not belonging to the debtor which might be available for its satisfaction, such as pledged Accommodation Collateral or any property, including a tax credit belonging to the parent which by reason of its fiduciary obligation to the holders of its wholly owned subsidiary's unsatisfied indebtedness the parent may be equitably bound to apply to that purpose.

By way of legitimate emphasis in a case of this importance, let us point out more clearly the strange position of the District Court.

In the reorganization proceeding No. 25591-S it approved a plan which gave to the bankrupt's secured creditors the entire trust estate *ex* the fund $17,201,739 arising under the special statute limited to holding companies which was not passed until *after* certification of the plan fixing the rights of the parties under which the debtor's secured creditors became in corporate form the reorganized Western Pacific Railroad Company. In so doing the Court approved a determination that out of the Bankrupt's estate *ex* the fund $17,201,739, the senior lien creditors would be fully satisfied, leaving $5,964,291 to spare toward paying off the creditors whose claims were collateralized by a *wholly* subordinate lien. The entire trust estate, together with the $17,201,739 fund, was afterwards transferred in corporate form to the creditors participating in the plan; subject, however, to an Assumption Agreement clearly embracing any liability

of the Trustees to account for their use of the tax credit of Western Pacific Railroad Corporation. Accountability of the Trustees to Western Pacific Railroad Corporation was resisted by the reorganized Western Pacific Railroad Company on the ground that being the Bankrupt's *sole* stockholder it was under a fiduciary duty to use its tax credit for the benefit of the Bankrupt's creditors which, again resorting to the rule of reason and common sense, can only mean the creditors not fully provided for under the plan. This position was clearly and forcefully upheld by the majority opinion in this Court of Judges Healy and Byrne; but in dismissing the successoral Bill of Complaint the District Court apparently intends to give the entire fund of $17,201,739 to the senior creditors already fully compensated under the plan and allow nothing whatever to the unpaid creditors whose superior equity was the basis for the dismissal of the Appellants' accounting Action No. 12506.

In all sincerity we respectfully suggest that if this result is permitted to remain undisturbed the District Court is put in a strange position where it appears to condone what, except for the absence of concealment and deceit, we are utterly unable to distinguish from the kind of fraud on creditors for which in the normal routine of its judicial duties the Court is accustomed to send offenders to institutions such as nearby Alcatraz.

At the risk of repetition and as a fair summary of this amazing case—these are the facts:

(a) The Supreme Court approved the determination that the Western Pacific Railroad Corporation's stock investment in the Bankrupt subsidiary was without value and was a total loss because the bankrupt's revenues in a period of two years and four months amounting to more than $21,000,000 (which, if untaxed, would provide more than $50 for each share of its preferred stock) would be largely absorbed by federal income and excess profits taxes; (b) the Trustees of the Bankrupt subsidiary thereupon caused this stock loss belonging exclusively to Western Pacific Railroad Corporation as the corporate parent of the consolidated group to be used to effect a remission of the very taxes the exaction of which was the underlying factor creating the loss; (c) the plan of reorganization so approved and remanded to the District Court accorded full compensatory treatment to the Bankrupt senior lien creditor out of their own security, leaving $5,964,291 to pass down to the junior lien on the ground that that redundancy of security remained after the senior lien holders had been fully satisfied and discharged; (d) $5,964,291 of the debtor's estate was then passed down to the creditors holding debtor's obligations secured by a wholly subordinate lien which was sufficient to satisfy *in full* all such creditors except one that was left with a deficiency of $3,681,175; (e) the Accounting Action No. 12506 brought by the Appellant Western Pacific Railroad Corporation to require the Appellee Railroad Company to account under its Assumption Agreement for the value of the use by its Trustees of the stock loss

belonging to the Western Pacific Railroad Corporation was dismissed under mandate of this Court on the ground that the parent was under a fiduciary duty to use its stock loss, or the taxes remitted thereagainst, for the benefit of the debtor's creditors; and, finally (f) a successoral Bill of Complaint forthwith filed by the Appellants designed to implement this Court's decision by requiring the reorganized Western Pacific Railroad Company to apply the remitted taxes to this incontestably equitable objective was summarily dismissed by the District Court and the Appellants were adjudged to be in contempt of Court for having filed it—a determination which, if permitted to remain unreversed, will give the entire fund of $17,201,739 to lien creditors already with one exception fully paid and discharged, and will give nothing whatever to creditors having valid claims allowed in the Bankruptcy proceeding, amounting to $11,358,855.

The prevention of such a result as a sequence, if not a consequence, of one of this Court's own decisions is a special circumstance warranting, we suggest, an exercise of the *en banc* power under Section 46(c).

The appeal from the contempt order presents an independent reason for a hearing *en banc*. It will be difficult for the Appellee to deny that the contempt proceeding was a rather patent effort by threat and coercion to avert a review in this Court of a vulnerable order it anticipated would be entered in the District Court for a dismissal of the successoral Bill of Complaint. The protection of the appellate jurisdiction

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The prevention of such a result as a sequence, if not a consequence, of one of this Court's own decisions is a special circumstance warranting, we suggest, an exercise of the *en banc* power under Section 46(c).

The appeal from the contempt order presents an independent reason for a hearing *en banc*. It will be difficult for the Appellee to deny that the contempt proceeding was a rather patent effort by threat and coercion to avert a review in this Court of a vulnerable order it anticipated would be entered in the District Court for a dismissal of the successoral Bill of Complaint. The protection of the appellate jurisdiction

of this Court and the right of a litigant freely and uninhibitedly to invoke it is certainly the collective responsibility of all Circuit Judges.

To meet the moral challenge of these appeals, all that the Appellee has to offer is to repeat the technical defenses such as laches, limitation and the bar of the irrelevant decree in bankruptcy which were ignored by this Court in No. 12506 and are plainly invalid under the decision of the Supreme Court in *Northern Pacific Railway Company v. Boyd,* already cited.

This litigation was characterized as "aged" in the opinion written by Justice Jackson.

It is our belief, which we will develop on the hearing, that if the pending appeals are heard by this Court sitting *en banc,* the litigation can be terminated under this Court's mandate without further proceedings in the District Court, and that on the existing unimpeachable record this Court can place every penny of the huge fund precisely where it belongs and where Congress intended that it should go, including interest accruals and legal expenses chargeable against the fund—all in accordance with the prayer of the annexed successoral Bill of Complaint.

The foregoing is most respectfully submitted as amply justifying the Court's resort to the *en banc* power.

Recognizing as we must that it may be difficult for all active Circuit Judges to convene at the same time and place to hear these appeals, the Appellants will

stipulate to submit on Briefs as to any judge or judges unable to attend oral argument.

Dated, September 27, 1954.

Western Pacific Railroad Corporation
and
Alexis I. du Pont Bayard, Receiver,
*Appellants,*

By LEROY R. GOODRICH,
*Their Attorney,*
FRANK C. NICODEMUS, JR.,
*WILLIAM MARVEL,
*Counsel.*

*Mr. Marvel participated in the preparation of this Memorandum prior to September 10, 1954 when he retired to become Vice Chancellor of Delaware. He is succeeded as counsel for receiver Bayard by James R. Morford.